Supreme Court, U. S.
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In the
Supreme Court of the United States

October Term, 1978.

No. 78-1203

ROBERT SHAGOURY,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Appeals Court of the Commonwealth of Massachusetts

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In the

Supreme Court of the United States

October Term, 1978

No.

ROBERT SHAGOURY,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari
to the Appeals Court for the
Commonwealth of Massachusetts

The petitioner, Robert Shagoury, prays that a writ of certiorari issue to review the opinion and judgment of the Appeals Court of the Commonwealth of Massachusetts entered September 12, 1978.

Opinion Below.

The opinion of the Appeals Court of the Commonwealth of Massachusetts is reported as Commonwealth v. Shagoury, ___ Mass. App. Ct. ___, 380 N.E.2d 708, (1978) (Mass. App. Ct. Adv. Sh. [1978] 927), and is reprinted at Appendix A to this petition at pp. 1a-42a . Further appellate review was denied by the Supreme Judicial Court of the Commonwealth of Massachusetts on November 6, 1978.[1] ___ Mass. ___ (1978), ___ N.E.2d ___ (1978)(Mass. Adv. Sh. [1978] ____).

Jurisdiction.

The opinion and judgment of the Appeals Court of the Commonwealth of Massachusetts was entered on September 12, 1978, and is reprinted as Appendix B to the petition at p.43a.

[1] Further appellate review by the Supreme Judicial Court of a decision of the Appeals Court is discretionary. Denial of further appellate review is not an affirmation of the decision or reasoning of the Appeals Court. Ford v. Flaherty, 364 Mass. 382,387-(1973), 304 N.E.2d, 112, 116 (1973)

The Supreme Judicial Court of the Commonwealth denied further appellate review without opinion on November 6, 1978.[2] The jurisdiction of this Court is involved under 28 U.S.C.§1257(3).

Questions Presented.

1. Did the Commonwealth violate the petitioner's Fourteenth Amendment right to be free of double jeopardy by introducing, in violation of the rule of collateral estoppel, at petitioner's second trial substantially the same evidence introduced at petitioner's first trial on different charges, where petitioner's acquittal at his first trial necessarily involved the jury's determination that petitioner had not committed the acts for which he was tried at his second trial?

2. Was petitioner's Fourteenth Amendment right to a fair trial infringed by the trial judge's denial, without hearing, of petitioner's motion for new trial which set forth allegations of prosecutorial impropriety in that the prosecutor had begun negotiation with the victim of petitioner's alleged larceny during the petitioner's trial and had commenced employment with the victim within two weeks following the conclusion of the trial?

[2] See footnote 1, supra.

3. Was petitioner's Fourteenth Amendment right to confront witnesses infringed because the judge permitted the Commonwealth to introduce a conversation for the purpose of impeaching an already introduced prior recorded grand jury statement of an unavailable witness?

4. Was petitioner deprived of his Fourteenth Amendment right to a fair trial by the trial judge's refusal to permit petitioner's request to poll the jury?

5. Is not at petitioner's second trial the exclusion from evidence of petitioner's certified copies of his acquittals at his first trial violative of his Fourteenth Amendment rights to due process and equal protection of law because the Commonwealth provides statutorily for admissibility into evidence of certified convictions without providing in any way for admissibility of certified acquittals?

Constitutional Provisions Involved

Constitution of the United States, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved.

Massachusetts General Laws c. 233, §21:

> §21. Proof of conviction of crime to affect credibility. The conviction of a witness of a crime may be shown to affect his credibility except as follows:
>
> First, The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.
>
> Second, The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction

was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

Fourth, The record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted to another crime or crimes within five years of the time of his testifying.

Massachusetts General Laws c. 233, §23:

§23. Impeachment of party's own witness. The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent

with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them.

Statement of the Case

In February, 1976, indictments issued against petitioner from Suffolk County alleging felonious larcenies of eighty-eight reels of cable from New England Telephone and Telegraph Company on July 22, 1975 (Indictment No. 97826) and of six reels of cable from the same company on August 13, 1975 (Indictment No. 97822). On April 13, 1977, after an eight day jury trial, the petitioner on these two indictments was found not guilty by jury. (R. 4, 19, 24)[3]

On September 23, 1975, a criminal complaint issued against petitioner from Somerville District Court alleging a felonious larceny of miscellaneous cable from New England Telephone and Telegraph Company on September 20, 1975. (R.2) After trial by a judge

[3] References to (R.) are to the printed Summary of the Record which contains the documents filed in the trial court.

in Somerville District Court, the petitioner appealed for a trial de novo by jury in Middlesex Superior Court (R. 2, 112).

On June 16, 1977, the petitioner filed his motion to dismiss the criminal complaint on the ground that the issues involved in the complaint had already been resolved in petitioner's favor at his Suffolk County trial (R. 24, 27, 112). Petitioner moved that the ground of collateral estoppel and res judicata in his motion to dismiss be reported to the Supreme Judicial Court or the Appeals Court (R. 16-18, 112). Both motions were denied by the trial judge and petitioner's exceptions were saved (R. 16, 24, 112).

Evidence began on July 13, 1977. All the petitioner's motions for directed verdict on collateral estoppel and res judicata grounds - upon the Commonwealth's opening (R. 41, 112-113), at the close of the Commonwealth's evidence (R. 43, 113) and at the close of all evidence (R. 45, 113) were denied and exceptions saved. The issue was raised by assignments of error (R. 1, 86-88, 92-96, 99) and decided adversely to petitioner. (App. 7a-15a).

On July 21, 1977, petitioner was found guilty of the lesser included offense of misdemeanor larceny and sentenced to a period of six months

incarceration (the same sentence he received in the Somerville District Court for felonious larceny)(R. 2, 113).

Petitioner filed his claim of appeal on July 22, 1977 (R. 55-56). A single justice of the Appeals Court on August 3, 1977 stayed execution of petitioner's sentence pending appeal (R. 58, 114).

On August 22, 1977, petitioner filed motion for new trial with accompanying affidavit (R. 64-67), alleging that the prosecutor knew at the time of trial of his intended future employment by the victim of the larceny for which petitioner was tried and began his employment within two weeks upon the conclusion of the trial. Petitioner further alleged a denial of due process because the prosecutor by intending this employment and by its nondisclosure to the trial judge had a conflict of loyalties which caused partial and unfair prosecution. Without hearing, the trial judge denied this motion and petitioner saved his exception to this ruling and claimed appeal therefrom on September 26, 1977 (R. 75, 80-81, 114). This issue was raised by assignments of error (R. 99-100) and decided adversely to petitioner (App. 15a-22a, 41a-42a).

At trial, the trial judge at petitioner's request was permitted to read

to the jury a portion of the grand jury testimony of an unavailable witness. Thereafter the trial judge wrongly admitted into evidence rebuttal testimony of a witness, Collins, as to a conversation between Collins and the unavailable witness. This conversation was to "impeach" the grand jury testimony of this unavailable witness. Petitioner saved his exception to the trial judge's permitting the introduction of this evidence (R. 97-98). This issue was raised by assignment of error (R. 97-98) and decided adversely to petitioner. (App. 32a-34a).

At trial, the trial judge refused admission of petitioner's certified copies of acquittals of his first trial. Petitioner alleged their relevancy and materiality to the issue of credibility of petitioner vis-a-vis witnesses who gave the same testimony against him at both trials. Petitioner alleged further that Massachusetts General Law, chapter 233, §21 providing for the utilization of convictions without providing for the utilization of acquittals constituted a denial of due process and equal protection of law to petitioner. Petitioner saved his exceptions to the exclusion of this evidence (R. 87, 98-99). This issue was raised by assignments of error (R. 87, 98-99) and decided adversely to petitioner (App. 28a-29a).

At trial, petitioner moved to poll the jury upon its return of a verdict of guilty on the lesser-included offense of misdemeanor larceny. The trial judge denied petitioner's motion, to which denial petitioner seasonably excepted. (R. 102-103). This issue was raised by assignment of error (R. 102-103) and decided adversely to petitioner (App. 39a-40a).

On September 12, 1978, the Appeals Court of the Commonwealth of Massachusetts affirmed petitioner's conviction.

The Supreme Judicial Court of the Commonwealth of Massachusetts, on November 6, 1978, refused to grant further appellate review of the affirmance of petitioner's conviction by the Appeals Court of the Commonwealth of Massachusetts.[4] (App. C).

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[4]See footnote 1, supra.

I. THE COMMONWEALTH BY SUBJECTING PETITIONER TO A SECOND TRIAL OF SUBSTANTIALLY THE SAME EVIDENCE IT HAD ALREADY INTRODUCED AT A FIRST TRIAL WHICH RESULTED IN PETITIONER'S ACQUITTAL VIOLATED HIS DUE PROCESS RIGHT TO BE FREE OF DOUBLE JEOPARDY

A. Petitioner's Acquittal At His First Trial Foreclosed Jury Consideration of the Issues of Joint Enterprise and Credibility Because These Issues Received Full Adjudication and Were Resolved In Petitioner's Favor

Petitioner was tried and convicted in Middlesex Superior Court in July of 1977 on a complaint charging him with committing larceny from the Telephone Company on September 20, 1975.

In April of 1977, petitioner had been tried in Suffolk Superior Court on two indictments charging him with larceny from the Telephone Company on July 22, 1975 and August 13, 1975. At the Suffolk trial, the Commonwealth introduced evidence of the September 20, 1975 larceny, allegedly to show that the petitioner was engaged in a joint enterprise with one Leon Dunphy and one Robert Conroy. (S.Tr. 381-387).[5]

[5] References to (S.Tr.) refer to the trial transcript of Suffolk County which is an exhibit to petitioner's motion to dismiss.

The testimony of Shagoury's participation in the larceny of September 20, 1975 came from one eyewitness, Collins, whose story was explicitly denied and contradicted by petitioner. Even though the jury knew that Dunphy and Conroy had pleaded guilty to the September 20, 1975 larceny, the jury, rejecting Collins' testimony, acquitted petitioner. The Commonwealth was therefore foreclosed from relitigating the same issues and presenting the same evidence relating to the September 20, 1975 larceny at the Middlesex trial on the basis of collateral estoppel, the issues being res judicata between the parties. Sealfon v United States, 332 U.S. 575, 68 S.Ct. 237 (1948); Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970); Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183 (1971); Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096 (1972).

In Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970) which clearly applies collateral estoppel to criminal law, this Court held that when an issue of ultimate fact has once been determined by a valid and final judgment that issue cannot again be litigated by the same parties in any subsequent lawsuit. The rule of collateral estoppel is applied not with hyper-technicality and archaism but rather with realism and rationality. 397 U.S. at 442-444, 90 S.Ct. at 1193-1194.

In Ashe v. Swenson, supra, Ashe was

one of four alleged robbers charged with armed robbery of six poker players. At his first trial Ashe was tried for robbing one poker player. Four of the card players at the first trial testified that they were each robbed by persons who were armed. The evidence that Ashe was one of the robbers was weak. The trial court instructed the jury that upon finding Ashe to have participated in the robbery he would be guilty of the offense even if he had not personally robbed the alleged victim, the one poker player whom Ashe was on trial for robbing. The jury returned a verdict of not guilty against Ashe. Six weeks later, a second trial against Ashe commenced for robbing another player at the same poker game. Although the witnesses at this trial were the same and testimony was substantially stronger on identifying Ashe, and the jury instructions were identical to those of the first trial, the jury returned a verdict of guilty.

This second trial was barred by collateral estoppel principles. The only conceivable issue in dispute at trial No. 1 being whether or not Ashe had been one of the robbers and Jury No. 1 by its verdict of not guilty finding that he had not, this Court said this was an issue of ultimate fact determined by a valid final judgment unable to be relitigated at trial No. 2 because the issue had been effectively decided at trial No. 1.

In the case at bar, one of the issues of ultimate fact necessarily determined by the Suffolk County jury in its verdict of not guilty was that petitioner had not jointly participated with Dunphy and Conroy on September 20, 1975. Dunphy and Conroy had already admitted their guilt and participation in a larceny from the Telephone Company on that date. This issue of ultimate fact having been determined by a valid final judgment and effectively decided at the Suffolk County Trial is thus foreclosed from subsequent prosecution. A conviction on the Middlesex County complaint became a legal impossibility because, according to the Commonwealth's evidence, petitioner in order to have committed the September 20, 1975 larceny, would have had to participate jointly with Dunphy and Conroy. The Commonwealth must be estopped from using the Suffolk trial as a rehearsal or "dry run" against petitioner. By introducing the September 20, 1975 evidence over petitioner's objection at the Suffolk trial, the Commonwealth took the risk that the full litigation of the issues of joint enterprise and Collins' credibility (issues essential to the Suffolk trial judgments) in Suffolk would prevent relitigation between the identical parties in another (Middlesex) venue and forum. Gidwani v. Wasserman, 1977 Adv.Sh. 1654, 1661, 365 N.E.2d 827, 832 (1977).

In Sealfon v. U.S., 332 U.S. 575, 68 S.Ct. 237 (1948), the defendant was found not guilty of conspiracy to defraud the United States. The defendant was later charged with the commission of the substantive offense of uttering and publishing as true false invoices, the subject matter of the conspiracy to defraud. The defendant was found guilty at a second trial on the substantive offense. At both trials the alleged false invoices, a letter from the defendent to a co-defendant and the same testimony was introduced against the defendent. On cross-examination at the second trial, further evidence against the defendant was introduced. This Court held that upon inquiry into the jury's verdict in the conspiracy trial of not guilty, the basic facts of each trial being identical and the core of the prosecutor's case in each trial being identical, the second trial was an attempt to prove an agreement between the defendant and co-defendant which had been necessarily adjudicated in the conspiracy trial to be nonexistent. The court found that the defendant had been denied his right to be foreclosed from a retrial. 322 U.S. at 580, 68 S.Ct. at 239-240. In Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183 (1971), this Court held that because the issue of identity of the bomb mailer had been decided at the first trial adversely to the State, subsequent prosecutions were foreclosed and the defendant's motion to dismiss

was granted.

That petitioner in the Suffolk County case was not on trial for the larceny of September 20, 1975, does not bar application of collateral estoppel to his case because issues adjudicated at his first trial in his favor and essential to the issues at his Middlesex trial do not involve the same charges. In Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096 (1972), Turner was tried and acquitted for a murder which occurred during a robbery. At this trial the jury had been instructed that the defendant was guilty of murder if he had killed the victim during the course of the robbery. After Turner's acquittal of murder he was indicted for robbery of the murder victim. The State contended that the jury's finding of not guilty on the murder could simply mean that the jury believed the murder to have been committed by a second individual. This Court rejected this argument in light of the trial judge's instruction to the jury that if the jury had found Turner present at the scene of the crime it would have had to return a verdict of guilty even if the defendant had not personally murdered the victim. This Court said the logical conclusion was that the jury found him not present at the scene of the murder and robbery.

Petitioner's previous judgment of acquittal was based upon a general verdict returned by the Suffolk County

jury. This Court, therefore, must examine closely the record of the prior proceeding taking into account the pleadings, evidence, jury instructions and closing arguments to reach a conclusion whether or not a rational jury could have granted the verdict upon an issue other than that which petitioner claims is barred from reconsideration by a subsequent jury. Ashe v. Swenson, supra. Laughlin v. U.S., 474 F.2d 444 (D.C.Cir. 1972), cert. den. 412 U.S. 941 (1973), reh. den. 414 U.S. 882 (1973).

A review of the issues at the Suffolk trial as argued by counsel to the jury and as framed by the court in his jury instructions compels the logical conclusion that the Suffolk jury found petitioner to have been free from wrongdoing on September 20, 1975.

In the case at bar, the Commonwealth introduced the evidence of September 20, 1975 to show that petitioner engaged in a continuing, joint, criminal enterprise with Dunphy and Conroy. The Commonwealth and petitioner introduced evidence to show the jury that Dunphy had committed the July and August, 1975, larcenies. The Commonwealth's evidence sought to join petitioner and Dunphy as joint participants in the July and August, 1975 larcenies. Petitioner's evidence sought to show that Dunphy (with Conroy on one occasion) was participating in those larcenies without petitioner. In order to acquit petitioner, especially in light

of the jury instructions on joint enterprise and in light of the closing arguments of both petitioner and Commonwealth which pitted Collins' credibility squarely and totally against petitioner's trial testimony and against Dunphy's grand jury statements, the jury in reaching its verdict of not guilty necessarily concluded that Collins' testimony was to be rejected and that petitioner was not involved in the transaction of September 20, 1975.

The issue of Collins' credibility versus that of petitioner was similarly foreclosed from consideration by the Middlesex jury in light of the verdict of the Suffolk jury. See United States v. Robinson, 418 F.Supp. 121, 125-126 (D.Md. 1976).

In the case at bar, the fact that petitioner was not engaged in a joint criminal enterprise with Dunphy and Conroy had been determined at the Suffolk trial. That petitioner was credible and Collins not credible has been similarly determined. These issues essential to the Middlesex litigation had been effectively foreclosed by the Suffolk jury's acquittal of the defendant.

B. The Appeals Court of the Commonwealth of Massachusetts Did Not Give Any Consideration to the Closing Arguments of Both Petitioner and Commonwealth and Did Not Address Itself to the

Question Whether the Issue of Credibility Was Collaterally Estopped From Relitigation

The Appeals Court of the Commonwealth of Massachusetts apparently recognized that Collins' testified about the alledged larceny of September 20, 1975 at both Suffolk and Middlesex trials. (App. 10a). The Court noted that petitioner was acquitted at his Suffolk trial. (App. 14a). The Court, however, found that the Suffolk jury received instructions that limited its consideration of Collins' testimony for the establishing of elements of intent, motive, scheme or design and that the effect of limiting consideration of Collins' testimony necessitates the conclusion that the jury had several bases on which to acquit petitioner. Had the Appeals Court looked realistically at the closing arguments of petitioner and Commonwealth, it would have seen that, albeit the trial judge's instructions, credibility of Collins vis-a-vis petitioner was an essential issue to be decided by the jury.

The evidence of the September 20, 1975 larceny was strongly argued to the Suffolk jury by both defense counsel and prosecutor (S.Tr. VIII, 820-826, 836-840 845-847). The jury was specifically informed by defense counsel that the credibility of petitioner was pitted against Collins. Defense counsel in his closing argument said:

> "Let me suggest to you that you have to find, in order to find Mr. Shagoury not guilty, you have to find that Mr. Collins lied." (S.Tr. VIII, 824).

The prosecutor also argued that the case turned on credibility and pitted petitioner's truthfulness against the truthfulness of Collins and others. The prosecutor in his closing argument said:

> "What this case boils down to is credibility --who to believe.
>
> "Now, Mr. Shagoury took the witness stand and, in effect, ladies & gentlemen, called six people liars. Six people liars. John Collins, a retired State Police Captain. According to Mr. Shagoury he lied with respect to his testimony of September 20th. Not mistaken. Lied.
>
> * * *
>
> ". . . because to believe that man, to believe his tale, you have to find that all six of them lied."

(S. Tr. VIII, 839-840.)

The trial judge in his instructions also focussed the jury's attention at length on how the jury was to determine the credibility of witnesses (S. Tr. VIII, 866-871).

The testimony, coupled with the closing arguments and instructions by the trial court to the jury clearly indicate

that all of the details of the September 20, 1975 larceny of Dunphy and Conroy were communicated to the jury and that the jury found in its verdict of not guilty that petitioner, not Collins, was telling the truth and did not participate in a joint venture with Dunphy and Conroy. The Appeals Court of the Commonwealth of Massachusetts incorrectly concentrated on whether or not petitioner's involvement in the September 20 theft was litigated; it should instead have concentrated on whether or not the elements of proof relating to the September 20, 1975, theft had been necessarily adjudicated at petitioner's first trial.

C. To Permit A Second Trial of Petitioner Wrongly Allowed the Commonwealth to Use the First Trial As A Rehearsal of the Second Trial

The Commonwealth, by introducing evidence of the September 20, 1975 transaction before the Suffolk jury over the repeated, strenuous objections of petitioner, should not have been provided a second opportunity to prove facts and issues identical to the ones rejected by the Suffolk jury. The Commonwealth was bound by the jury's acquittal in Suffolk County, and foreclosed from retrying the same issues at the Middlesex trial on the grounds of collateral estoppel, res judicata and double jeopardy. Gidwani v. Wasserman, 1977 Adv.Sh. 1654,

1661; 365 N.E.2d 827, 831-832 (1977).

To find that petitioner may be twice tried on the same facts between the same parties would grant a windfall to assistant district attorneys. When a defendant is charged with crimes in various counties, all prosecutors could agree that the first county to try the defendant should introduce evidence of all other crimes pending in other counties. These methods would have the tendency of "burying" the defendant with no danger to the Commonwealth, for in the event of acquittal in the first county, the defendant, even though he would have already defended against the other county's charges, would still be exposed to further prosecution as if these remaining offenses had never been introduced against him. This is the quintessential danger that the double jeopardy provision of the Constitution seeks to protect against. Petitioner should be so protected by this Court and his motions to dismiss the Middlesex complaint or receive a directed verdict thereon should have been granted.

II. WHERE THE PROSECUTOR, WITHOUT DISCLOSURE TO THE COURT, NEGOTIATED EMPLOYMENT WITH THE VICTIM OF THE CRIME DURING TRIAL AND ACCEPTED SAID EMPLOYMENT WITHIN TWO WEEKS AFTER TRIAL, IMPROPRIETY IS MANIFESTED AND A DUE PROCESS VIOLATION HAS OCCURRED.

A. Where Facts in the Record and Questions Raised By Affidavits Suggest a Personal Interest On the Part of the Prosecutor, the Appearance of Impropriety Necessitates a New Trial.

On August 31, 1977, petitioner filed a Motion For New Trial (R. 63-65) together with an affidavit in support of same (R. 66) based upon the prosecutor's newly discovered employment with the New England Telephone Company. The Motion For New Trial alleged that on July 21, 1977, petitioner was convicted of the crime of misdemeanor larceny from the New England Telephone Company and sentenced to a period of incarceration of six months, (the same length of sentence having been imposed by the Somerville District Court for felonious larceny) that, at the time of sentencing, the Assistant District Attorney made the recommendation adopted by the court, that the Assistant District Attorney apparently knew during the course of the trial and at the time of sentencing that upon the conclusion of the trial, he would shortly thereafter begin employment with the New England Telephone Company, the victim and real complainant against the defendant and that the fact of his future employment was never made known to the court or to defense counsel, either before, during or after trial. The prosecutor began work at the New England Telephone Company within two weeks of the conclusion of the trial.

Petitioner asserted in his Motion For New Trial that, upon information and belief, the prosecutor's employment with the New England Telephone Company was negotiated before the trial and disposition of the defendant were terminated. As a result, the defendant alleged that he had been deprived of his right to due process because the prosecutor, in trying the defendant for this crime, and in recommending the sentence that he did, was serving interests that conflicted with his duties of impartial and fair prosecution.

The Commonwealth submitted two affidavits in opposition to petitioner's Motion For New Trial, one from Davenport, a general attorney for the New England Telephone Company (R. 69) and the other from the prosecutor, Lopata (R. 71). Davenport stated that Lopata's employment with the Telephone Company was not conditioned upon the outcome of the Shagoury matter, and that no contingencies whatsoever related thereto. He further stated that he offered Lopata the position on or about July 15, 1977, but that Lopata informed him that he was still prosecuting the Shagoury matter and that he could not make any commitments until that matter was over. Lopata's affidavit corroborated Davenport's in these respects.

Nowhere does the Telephone Company indicate how it first became aware of Lopata and how it came to offer him a position with that company (R. 89),

questions which could and should have been appropriately explored at a hearing on this issue, which hearing petitioner was improperly denied by the Court.

On September 21, 1977, the trial judge denied petitioner's motion without a hearing (R. 74). On September 26 1977, the petitioner filed a Motion For Hearing and Reconsideration (R. 83) alleging in effect that at the time the Motion For New Trial was filed, defense counsel requested in a letter to the clerk's office that a hearing be held on the motion at which time the petitioner intended to present testimony to support the allegations contained therein (R. 83), and that on September 1, 1977 defense counsel further requested a hearing during a telephone conversation with the trial judge at which time the trial judge suggested a tentative hearing date of September 30, 1977 (R. 83-84). The trial judge never acted upon this motion (R. 83, 114).

A defendant has a right to a fair trial, a basic requirement of due process. Not only must there be an absence of actual bias at the trial, but both the probability and the appearance of unfairness must be scrupulously avoided. The proceedings in a criminal trial must be impartial. Commonwealth v. Howard, 367 Mass. 569, 571-572; 327 N.E.2d 736, 738 (1975).

In the case at bar, the prosecutor apparently served two masters at the same time, in violation of various

ethical canons. The Code of Professional Responsibility provides that a lawyer is not to accept employment from one party when the employment may cause the exercise of his professional judgment on behalf of his client to be affected by his own interests, financial, business or personal. See Disciplinary Rule DR5-101(A). A lawyer is to decline such proferred employment under these circumstances DR5-105(A). In the case at bar, Lopata, while an Assistant District Attorney, and while trying petitioner, whom the Telephone Company alleged to have stolen materials from it, negotiated with the Telephone Company to become its employee. Such negotiations should have occurred, at the very earliest, when all proceedings against the petitioner had been terminated. At the very least, knowledge of such ongoing negotiations should have been disclosed both to the Court and defense counsel so that the right to an impartial trial could be preserved for petitioner.

Petitioner could not possibly know whether or not the prosecutor's job opportunity was conditioned either upon conviction of petitioner or upon incarceration of petitioner. Consequently, the trial, and the prosecutor's recommendation of sentence lack the appearance of propriety. Lopata simply should not have negotiated or accepted private employment with the Telephone Company, when he was a public employee, an Assistant District Attorney, who had substantial responsibility in a Telephone Company matter.

This was gross professional impropriety. See DR9-101(B).

This Court has sought to maintain the highest standards of integrity in a system of trials. Lopata, by negotiating and accepting employment with the Telephone Company, became a stakeholder in the prosecution of petitioner; in effect, were the jury to have returned a verdict of not guilty, the Telephone Company would have been disadvantaged severly in the civil suit then pending wherein petitioner sought damages for improper discharge against Lopata's present employer. (M. Tr. III, 293-294).[6/] No one can gainsay that the prosecutor had a pecuniary interest in the outcome of the trial against petitioner when petitioner's conviction aided his future employer in obviating petitioner's civil litigation.

Officers of the court acting in quasi-judicial capacity, such as an Assistant District Attorney, are disqualified by their interest in a controversy to be decided. Tumey v. Ohio, 273 U.S. 510, 522, 47 S.Ct. 437, 441 (1927). A person with a substantial pecuniary interest in legal proceedings should not participate in those disputes. Arnette v. Kennedy, 416 U.S. 134, 197; 94 S.Ct. 1633, 1655 (1974) (Opinion of Justice White); Ward v. Village of Monroeville, 409 U.S. 57, 59-60; 93 S.Ct. 80, 82-83 (1972). No matter how insubstantial or trifling Lopata's interest appears, his interest renders him incompetent to have tried the case. Who can say Lopata's mental state was unaffected by the interest that his future employer had in the controversy which he was then prosecuting. See Pearce v. Atwood, 13 Mass. 324, 339 (1816); see also Taylor v. County Commissioners, 105 Mass. 255, 226-227 (1870).

6/ References to (M. Tr.) refer to the trial transcript of Middlesex County.

Where the prosecutor and the alleged victim of the crime entered negotiations that would establish financial relationships between themselves, Lopata's possible temptation to be partisan necessarily involved a lack of due process of the law in the trial of the defendant. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147-149, 89 S.Ct. 337, 338-339 (1968); Ward v. Village of Monroeville, 409 U.S. 57, 59-60, 93 S.Ct. 8), 82-83 (1972). The actions of the prosecutor and the Telephone Company constituted unfairness in their impact upon the petitioner's trial.

Our system of law has continuously endeavored to prevent even the probability of such unfairness. Withrow v. Larkin, 421 U.S. 35, 37, 95 S.Ct. 1456, (1975). In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955).

Under these circumstances a new trial must be ordered. The fact that the Assistant District Attorney had a conflict of interest in his serving both the State and his future private employer is a factor that affects both the

appearance of justice and actual justice, elemental components of due process, Offutt v. United States, 348 U.S. 11, 14 75 S.Ct. 11, 13 (1955); Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S.Ct. 499, 505 (1971) which necessitates a new trial for petitioner.

B. Petitioner Need Show No Specific Prejudice In Order To Obviate A New Trial

The Commonwealth may suggest that petitioner has remained unharmed by the prosecutor's employment. Cases are clear however, that where divergent interests of an attorney at trial existed, petitioner need not delineate the precise manner in which he has been harmed by a conflict of interest, but need only show a possibility of harm in an area of fundamental rights to render his conviction invalid. See Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966) citing Glasser v. United States, 315 U.S. 60, 75-76, 62 S. Ct. 457, 467 (1942). Certainly, a hearing should have been held by the Court to determine, at the very least, that no possibility of harm existed. Where circumstances create either the likelihood or appearance of bias, courts have found the denial of due process even if there is no demonstrated showing of actual bias in the tribunal. Peters v. Kiff, 407 U.S. 493, 502, 92 S.Ct. 2163, 2168 (1971). Where a District Attorney prosecuted a case against a defendant while simultaneously he represented the defendant's

wife, in a divorce proceeding, the Court found a conflict of interest prohibiting the possibility of fair-minded exercise of the prosecutor's discretion. Ganger v Peyton, 379 F.2d 709, 712-713 (4th Cir. 1967). The Court found that the prosecutor's own self-interest in civil litigation rendered the prosecutor unable to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree. . . , or (3) whether to recommend a suspended sentence or other clemency. Id. at 713. The Court further found a strong possibility that the prosecutor had abdicated to the prosecuting witness, Ganger's wife, in the criminal case, his prosecutorial responsibilities and discretion in making decisions. Ibid. In the case at bar, there is a strong possibility that the prosecutor may have abdicated to the New England Telephone Company the exercise of his responsibility and discretion in making decisions consonant with the attainment of justice because of his self-interest in obtaining future employment with the Telepone Company. Such conduct necessitates the ordering of a new trial, or, at best, a remand for hearing on this possibility. The Court's blatant denial of petitioner's request for hearing constitutes, therefore, a denial of due process.

A prosecutor in a criminal case is not out just to win but is to aid the accomplishment of justice. The methods he uses to produce a conviction must not be improper. See Berger v. United States

295 U.S. 78, 87-88, 55 S.Ct. 629, 633 (1935).

C. The Appeals Court of the Commonwealth of Massachusetts Narrowly Focussed on the Sentence Recommended by Prosecutor and Did Not Address the Other Ways In Which the Record Revealed Potentiality For Prosecutorial Wrongful Motivation.

The Appeals Court of the Commonwealth of Massachusetts failed to notice that the prosecutor's bifurcated loyalties in the case may have affected petitioner adversely in ways other than sentencing. At a pretrial hearing, the prosecutor was adverse to reporting to a higher court the question concerning collateral estoppel. (See Reasons for Granting the Writ I, supra). The prosecutor's refusal might have been spawned by his loyalty to his new-found employer instead of to the Commonwealth (Tr. of Hearing on Motions, p. 38, 52). The prosecutor may have been influenced by the civil litigation pending by petitioner against his future employer. The Appeals Court heavily relied upon the prosecutor's recommendation of six months incarceration, which followed policy of requesting the same sentence meted out in district court, (see App. 20a-21a) as being the linchpin manifesting prosecutorial integrity. Nowhere is it

noted that the district court sentence was for felonious larceny which was reduced to a misdemeanor larceny by jury verdict, the six month recommendation obviously ignoring the seriousness and severity of the crime, a factor usually considered by prosecutors. Petitioner is entitled to the assurance of an entirely impartial prosecutor acting solely in the Commonwealth's interest. The record here deprives petitioner of his due process right to that assurance.

III. THE TRIAL COURT'S PERMITTING TESTIMONY TO "IMPEACH" RECORDED GRAND JURY MINUTES OF AN UNAVAILABLE WITNESS DEPRIVED PETITIONER HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO FAIR TRIAL.

The judge wrongfully admitted into evidence rebuttal testimony of Collins as to a conversation wherein Dunphy stated to Collins that he did not "want to get Shag in trouble". The prosecutor sought by this testimony to impeach Dunphy's grand jury testimony and also to inculpate Shagoury.

Defense counsel had read to the jury a portion of Dunphy's grand jury testimony which exculpated petitioner. This procedure was appropriate for Dunphy had invoked his Fifth Amendment privilege against self-incrimination and hence became "unavailable". California v. Green, 399 U.S. 149, 165-168, 90 S.

Ct. 1930, 1938-1940 (1970). Commonwealth v. DiPietro, 1977 Adv. Sh. 1971 1976-1984,1988-2003, 367 N.E.2d 811, 815-818, 824-825 (1977). Dunphy's unavailability rendered impermissible the Commonwealth's introduction of an allegedly prior inconsistent statement for impeachment purposes. This Court in analagous situations has held that where, after prior-recorded testimony of a deceased witness had been introduced, impeachment of the testimony has been prohibited. Ayers v. Watson, 132 U.S. 394, 10 S.Ct. 116 (1899); Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, (1895); see also Franzen v. E.I.DuPont De Nemours & Co. 146 F.2d 837 (3rd Cir. 1944); and United States v. McBride, 463 F.2d 44 (5th Cir. 1972), cert. den. 409 U.S. 1027 (1972).

The rationale for prohibiting the impeachment of a deceased witness's prior recorded testimony is that he is "no longer available to explain or deny the supposed contradictory statements which, had he been alive, he would have had an opportunity to do in rebuttal." Franzen v. E.I.DuPont DeNemours & Co., supra, at 842. The witness's unavailability places him beyond the reach of any power of explanation and prohibits the use of such contradictory declarations. Ayers v. Watson, 132 U.S. 394, 404-405, 10 S.Ct. 116, 118 (1889).

Indeed, the dangers inherent in the use of such prior inconsistent statements is greatest when the statement is not a prior recorded statement made

under oath, but merely an unaffirmed oral statement made to a third party which cannot be corroborated at all, such as Collins' testimony as to Dunphy's alleged statement in the case as bar. This Court held in Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337 (1895), that prior testimony of a deceased witness given at an earlier trial could not be impeached through the testimony of two other witnesses at a later trial where the deceased witness was no longer available. This Court explained the inherent dangers as ones of offering the temptations of perjury and fabricated testimony to those who would seek to impeach the testimony of a now unavailable witness, 156 U.S. at 250, 15 S.Ct. at 342.

Collins' testimony about Dunphy's statement is fraught with the same dangers and inherent unreliability against which this Court warned. This rebuttal evidence necessarily engendered grave prejudice to petitioner. This statement was a powerfully incriminating, extrajudicial one, which, had it been introduced at a joint trial of Dunphy and petitioner, would have required a severance under Bruton v. United States, 391 U.S. 123 (1968) because careful limiting instructions could not have sufficiently protected petitioner. Because of Dunphy's availability to explain away Collins' testimony, petitioner practically became a Bruton victim, as Dunphy's statement heavily tended to incriminate

him.

Whether a witness is made unavailable by death or by invocation of his privilege against self-incrimination, the rule of Ayers and Mattox applies, since it is the fact of unavailability, not its cause, which gives rise to the rule, (California v. Green, supra, 399 U.S. at 165-168, 90 S.Ct. at 1938-1940) and to the dangers of an absent witness "beyond the reach of any power of explanation". Ayers v. Watson, supra, 132 U.S. at 404, 10 S.Ct. at 118.

The Dunphy/Collins conversation occurred before Dunphy was called to testify before the grand jury. It was known to Collins and therefore known to the Commonwealth at the time of Dunphy's grand jury testimony and could have been brought to his attention at that time. The fact that the Commonwealth did not question Dunphy about it in the grand jury lends further suspicion as to its untrustworthiness and mandates that the Commonwealth be foreclosed from using the statement at petitioner's trial because Dunphy was not present to refute it.

The Commonwealth, moreover, was in effect attempting to impeach its own witness. Dunphy had been subpoenaed by the Commonwealth to testify before the Suffolk Grand Jury. Solely because Dunphy's grand jury testimony contained evidence exculpating Shagoury, the defendant was permitted to read it to the jury. However Dunphy remained a Commonwealth wit-

ness in the sense that the Commonwealth had called him before the grand jury, an ex parte proceeding. As a result, the Commonwealth could not impeach its own witness without laying a proper foundation. See Mass. Gen. Laws c. 233, §23. Absent such a foundation, the attempted impeachment was improper. No such foundation was made in this case because Dunphy, having only testified to his name and address before he invoked his privilege against self-incrimination, could not be impeached on his allegedly prior inconsistent statement both made out of court and implicating petitioner. Any other rule denies petitioner his constitutional right of confrontation and fair trial, for without Dunphy, petitioner was powerless to counteract the harmful effects of this most damaging hearsay statement.

The Appeals Court of the Commonwealth of Massachusetts rejected petitioner's contention (App. 33a) and without explanation concluded that Dunphy's unavailability would not bar impeachment of his grand jury testimony. The Court never mentioned petitioner's constitutional right in this matter and failed to discuss in any way this Court's prior pronouncements in this area.

IV. PETITIONER'S RIGHT TO POLL THE JURY IS A FUNDAMENTAL RIGHT OF DUE PROCESS AND FAIR TRIAL WHICH CAN NOT BE CONSTITUTIONALLY DENIED BY A COURT

Petitioner maintains he possesses a constitutional right to poll a jury to ascertain that his guilt was decided by jury unanimity. This right is firmly imbedded in the right to fair trial and is a part of due process. This Court has not yet spoken on this issue whether or not a defendant enjoys a constitutional right to poll the jury.

The petitioner's motion to poll the jury came after it returned a verdict of guilty on the lesser-included offense of larceny under $100.00, a misdemeanor. No evidence existed to indicate the value of the goods stolen to be under $100.00. The evidence concerning value over $100.00 had been struck from the case. The jury verdict in this case, therefore, raised some troubling issues which a poll of the jury might have obviated. At the very least, petitioner is entitled to make absolutely certain that his entire jury decided his guilt.

Commonwealth precedent clearly establishes that a Court's refusal to poll a jury constitutes no abuse of discretion as the defendant has no right to have a jury polled. Such has been the law of the Commonwealth since 1832 in Commonwealth v. Roby, 12 Pick. 496 (1832) to the present. Commonwealth v. Jones, 1977 Mass. Adv. Sh. 2041, 2047; 367 N.E. 2d 631, 634 (1977). See also Commonwealth v. Goldenberg, 338 Mass. 377, 386 155 N.E.2d 187, 193 (1959); Commonwealth v. Fleming, 360 Mass. 404, 274 N.E.2d 809, 812 (1971); Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 275 N.E.2d 33, 97 (1971); Commonwealth v. Caine, 366 Mass. 366, 372; 318 N.E.2d 901, 908 (1974); Commonwealth v. Valliere 366 Mass. 479, 321 N.E.2d 625, 637 (1974) Commonwealth v. Bregnard, 1975 Mass. App. Ct. Adv. Sh. 1153, 1160-1161, 334 N.E.2d 64, 67, 68 (1975). Commonwealth precedent has never discussed whether or not a defendant has a constitutional right to a jury poll. Instead, as the Appeals Court of the Commonwealth of Massachusetts did in petitioner's case, it discussed a poll of jury only in terms of judicial discretion, not in constitutional terms. (App. 39a-40a).

No rationale exists for courts to refuse to protect a defendant's unassailable right to a fair trial by polling the jury. Massachusetts precedent flies squarely in the face of the ABA Standard Relating to Trial by Jury, §5.5, which provides the blanket rule that "the jury shall be polled at the request of any party or upon the Court's own motion." There always exists the chance that a juror was momentarily and unwillingly coerced by the force of other jurors to abdicate his or her function in returning a verdict based on that individual juror's belief.

V. THE IMPROPER EXCLUSION OF PETITIONER'S RELEVANT AND MATERIAL CERTIFIED COPIES OF ACQUITTAL DEPRIVED PETITIONER OF DUE PROCESS AND EQUAL

PROTECTION OF LAW.

The Court refused the admission at petitioner's second trial of certified copies of petitioner's acquittals at his first trial (Exhs. M and N for Id.) A judgment of acquittal, when relevant and material, can rightfully be considered by a jury in passing upon the credibility of witnesses testifying at a trial. Pilcher v. United States, 113 F. 248, 249 (5th Cir. 1902), see Wingate v. Wainwright, 464 F.2d 209, 214, fn. 5 (5th Cir. 1972) and Commonwealth v. Cresta, ___ Mass. ___, 1975 Mass. App. Ct. Adv. Sh. 1286, 336 N.E.2d 910 913 (1975).

In the case at bar, the central issue to be determined by the jury was the credibility of Collins vis-a-vis petitioner. Petitioner was thus entitled to show that Collins' previous testimony at the first trial resulted in acquittals. This was relevant, material information for the Middlesex jury to consider on both petitioner's and Collins' credibility. Pilcher v. United States, supra.

The acquittals, moreover, were crucial to petitioner's defense as they were evidence that petitioner was found innocent of larcenies of which Dunphy was convicted, and of which the Middlesex jury was made aware both by testimony and by the introduction of exhibits of certified copies of Dunphy's convictions. These acquittals, therefore, would have undermined the joint venture theory on which

the Commonwealth was proceeding and on which the Court instructed. As such, these acquittals were exculpatory for the petitioner and their exclusion was grave constitutional error.

Mass. G. L. c 233, §21 provides that convictions may be utilized to impeach credibility. The failure of the Legislature, however, to provide for the admission of certified copies of acquittals under any conditions is certainly a denial of equal protection and due process to petitioner. The statutory policy of §21 is clear that conviction evidence tends to establish the lack of reliability of the testifying witness and, as such, to affect his credibility by evidence of bad character. The introduction of petitioner's acquittals where the identical testimony had been previously given at a first trial by Collins and by petitioner were corroborative of petitioner's credibility and Collins' lack thereof.

Because Chapter 233,§21 unconstitutionally fails to provide any set of circumstances under which acquittals may be admitted as evidence while it sets forth the restricted uses of conviction evidence, and because the Court excluded evidence of petitioner's Suffolk acquittals from jury consideration, the petitioner was denied both his due process rights to a fair trial and to the effective use of exculpatory evidence and his right to equal protection of law.

The Appeals Court of the Commonwealth of Massachusetts did not concern itself with petitioner's constitutional objections. (App. 28a-29a). The Appeals Court without explanation concluded that the acquittals served no useful purpose and might have caused jury confusion. The facts of the case as above stated clearly indicate the factual supports for the Appeals Court's conclusion is lacking. Petitioner's equal protection claim was virtually ignored by the Appeals Court.

The Equal Protection Clause requires strict scrutiny of a legislative classification when the classification impermissibly interferes with the exercise of a fundamental right. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566 (1976). There can be no more fundamental right than the right of a criminal defendant to present relevant, material evidence of an exculpatory nature. See Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 1196-1197 (1963); Giles v. Maryland, 386 U.S. 66, 74, 87 S.Ct. 793, 797 (1967); Weber v. Aetna Cas. & Sur. Co. 406 U.S. 164, 172-173, 92 S.Ct. 1400, 1405 (1972). Mass. G. L. c. 233, §21 operates to the peculiar disadvantage of criminal defendants by providing a distinct statutorily sanctioned method of impeachment by the use of prior convictions without having a rational basis for its absence of any provision providing for the uses of acquittals. Failure to sanction the use of acquittals and the creation by statute of

of the use of convictions is a legislative classification that reveals no rational relationship to a legitimate governmental interest. U.S.Dept. of Agriculture v. Moreno, 413 U.S. 528, 533, 93 S.Ct. 2821, 2825 (1973); Turner v. Fouche, 386 U.S. 346, 362, 90 S.Ct. 532, 541 (1970).

Conclusion

For the reasons stated, petitioner asserts that the affirmance of his conviction by the Appeals Court of the Commonwealth of Massachusetts was not in accord with applicable decisions of this Court and that this Court should grant the petition for a writ of certiorari to the Appeals Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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Appendix A.

APPEALS COURT.

No.

COMMONWEALTH vs. ROBERT SHAGOURY

Middlesex June 15, 1978 -
September 12, 1978.

Present: Hale, C.J., Armstrong,
& Brown, JJ.

Larceny. Practice, Criminal, Collateral estoppel, Fair trial, Prosecutor's conflict of interest, Charge to jury. Evidence, Sketch, Of value, Opinion, Prior acquittal, Relevancy and materiality, Disclosure of evidence before grand jury. Witness, Impeachment.

Complaint received and sworn to in the District Court of Somerville on September 23, 1975.

Upon appeal to the Superior Court, the case was tried before Hallisey, J.

James B. Krasnoo (Stephen J. Buchbinder with him) for the defendant.

Robert M. Raciti, Legal Assistant to the District Attorney for the Commonwealth.

HALE, C.J. In May, 1976, the defen-

dant was convicted in the District Court of Somerville on a complaint charging him with the theft of property (miscellaneous cable) having a value greater than $100. He appealed to the Superior Court and after a jury trial held in Middlesex County under G. L. c. 278, §§ 33A-33G, in July, 1977, was found guilty of larceny of property having a value of less than $100. He has now appealed to this court and has argued numerous assignments of error relating to the Superior Court proceeding. After examining the entire record in this case, we conclude that no reversible error is disclosed by the defendant's contentions, and we affirm the judgment of the Superior Court.

In the Superior Court trial there was evidence from which the jury could have found that one Collins and one Moriarty were employed as security representatives by the New England Telephone Company. One of their assignments during September, 1975, was to maintain surveillance of a telephone company warehouse located in Somerville. That warehouse was being used at that time to store telephone equipment and cable.

Collins and Moriarty met at the warehouse at about 7:00 A.M. on Saturday, September 20, 1975. They observed no other telephone company employees in the warehouse area at that time. Moriarity sat in his automobile which was positioned so as to afford him a view of the door of the warehouse. Collins

hid himself inside the warehouse in a location above a restroom, where he had a view of the area inside the warehouse. At about 8:00 A.M. Dunphy and Conroy, two employees of the telephone company, arrived at the warehouse. They opened the door and drove a blue panel truck or van belonging to Dunphy into the warehouse. They stopped the truck about twenty-five to thirty feet from Collins' position on the restroom roof and closed the door.

After Dunphy and Conroy had been in the warehouse for about five minutes, they began uncoiling several types of cable from reels which were stacked in the warehouse. The cable consisted of copper wires wrapped in insulating mat-

erial. Dunphy and Conroy uncoiled various lengths of cable from the reels, cut them off, tied them into small coils and threw the coils into a pile near Dunphy's truck. At about 8:45 the defendant, who was employed as a foreman in the Somerville warehouse, arrived at the warehouse and sounded the horn of his green Lincoln sedan. Conroy opened the door and the defendant drove the sedan into the warehouse. He parked just behind Dunphy's truck, and Conroy closed the door. The defendant then assisted Conroy and Dunphy in removing cable from the reels until about 9:15. The men then engaged in a conversation, in which the defendant was heard to remark, "You have got enough. He could come in at any moment." Dunphy passed some money to

the defendant. Dunphy and Conroy then used a forklift to load cable into Dunphy's truck. The defendant opened the door and moved his automobile out of the warehouse. Conroy and Dunphy then left in the truck.

Moriarty followed the truck in his automobile. Collins quietly slipped out of the warehouse without revealing his presence to the defendant, who remained straightening out the area. Collins got into his automobile and drove to a junkyard in Boston, where he met Moriarty. Moriarty confronted Dunphy and Conroy at the junkyard as they were in the process of unloading the cable from Dunphy's truck. He contacted the Boston police, and Dunphy and Conroy were arrested on larceny

charges. Later the defendant was also charged with larceny. Dunphy and Conroy ultimately pleaded guilty to charges relating to the theft of the cable.

1. We address first the defendant's assignment of error which alleges that the denial of his motions to dismiss and for a directed verdict based upon the Commonwealth's introduction of certain evidence at trial was in violation of the prinicples of collateral estoppel. He argues that the Commonwealth's case was dependent on the introduction of evidence which had already been introduced at an earlier trial in Suffolk County that had resulted in the defendant's acquittal.

In the interim between the defendant's conviction on the present com-

plaint in District Court and his trial in Superior Court, the defendant was tried in the Superior Court in Suffolk County on two indictments charging him with larceny. Under the first indictment the defendant was charged with the theft of eighty-eight reels of cable from the telephone company on or about July 22, 1975. The second indictment charged the defendant with the theft of six reels of cable from the telephone company on or about August 13, 1975.

In the Suffolk County trial there was evidence tending to show that on July 22, 1975, the defendant had directed a trucker, who had arrived at the Somerville warehouse to deliver eighty-eight reels of cable, to take

his load to a private storage facility located in Roxbury. At that location the cable had been unloaded with the assistance of Dunphy. On August 13, 1975, the defendant had gone to a warehouse in Fall River and had removed six reels of telephone company cable for the stated purpose of transferring them to the Somerville warehouse. A telephone company employee testified that the telephone company possessed no record of either a July 22 or an August 13 shipment of cable to the Somerville warehouse. The employee also testified that the defendant was not authorized to engage private warehouse space on behalf of the telphone company. It was the Commonwealth's contention that under the circumstances the jury could infer

that the two loads of cable had been stolen by the defendant in a joint venture with Dunphy and others in a continuing course of larceny from the telephone company from July 22 to September 20, 1975. To further support that position the Commonwealth called Collins to the stand and had him testify with regard to the events which had occurred at the Somerville warehouse on September 20, 1975. The defendant argues that, as the Commonwealth's presentation of Collins' testimony placed the issue of the defendant's involvement in the theft of cable on September 20 before the jury in the Suffolk County trial and as the jury must have decided that issue against the Commonwealth in finding the defendant not guilty, the Commonwealth was thereby fore--

closed from relitigating the question of his participation in the September 20 theft in the present trial. We do not agree.

The doctrine of collateral estoppel operates to insure that due process is not violated in consecutive criminal proceedings against the same defendant by foreclosing the relitigation of those issues in the defendant's second trial which were determined by the verdict in his earlier trial, even though the offenses charged in the two trials may not be the same. Sealfon v. United States, 332 U.S. 575, 578 (1948). Harris v. Washington, 404 U.S. 55, 56 (1971). Where the prior proceeding against the defendant results in a general verdict of acquittal, the court must examine the evidence,

pleadings and other relevant material from the prior proceeding to determine whether a rational jury could have grounded their verdict upon some issue other than that which the defendant seeks to foreclose from consideration in the later proceeding. Ashe v. Swenson, 397 U.S. 436, 444 (1970). Ottomano v. United States, 468 F.2d 269, 272 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). The defendant has the burden of establishing that the issue of fact which he seeks to foreclose from consideration in the subsequent proceeding was necessarily determined in his favor by the verdict in the prior proceeding. United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), cert. denied 419 U.S. 1079 (1974). United States v.

King, 563 F.2d 559, 561 (2d Cir. 1977). The defendant in this case has failed to sustain that burden.

For assistance in determining whether the issue of the defendant's participation in the September 20 theft was necessarily determined in his favor by the jury in the Suffolk County trial, we look to the instructions which were given to the jury by the judge during the Suffolk County trial. See Sealfon v. United States, supra, at 579. Turner v. Arkansas, 407 U.S. 366, 369 (1972). The judge instructed the jury both prior to allowing Collins to testify and during his general charge at the close of the evidence that they were not to consider Collins' testimony in determining whether the defendant had committed any thefts

other than those which were alleged to have occurred on July 22 and August 13. The judge further instructed the jury that they could properly consider Collins' testimony only as it tended to establish elements such as intent, motive, scheme, or design with regard to the proof of the indictments against the defendant. In view of these instructions it appears that the jury at the Suffolk County trial could only have considered Collins' testimony for quite limited purposes. Accordingly, we can perceive of several rational bases upon which the Suffolk County jury could have acquitted the defendant on the charges that he had committed the July and August thefts in Suffolk County without having determined that the defendants had not participated

in the September 20 theft. For example, the jury, while believing the testimony concerning the September 20 theft in Middlesex County (or without having reached the point of considering it), could have found that the defendant was not present or did not act in concert with the others in the commission of the Suffolk crimes. As the Suffolk jury did not necessarily determine the issue, the Commonwealth was not foreclosed from litigating in the present trial the issue of the defendant's involvement in the September 20 theft.

2. The defendant assigns as errors the denial of his motion for a new trial on the ground that he was deprived of due process of law by reason of a conflict of interest which arose on the part of the

prosecutor during the course of the trial. The motion was heard on affidavits submitted by the defendant's attorney, by the prosecutor, and by general counsel for the telephone company. It appears from those affidavits that on July 15, 1977, the fourth day of trial in Superior Court, the prosecutor was offered a position as an attorney with the New England Telephone Company. The prosecutor informed the telephone company at that time that he was still involved in the prosecution of the present case. He stated that although he was interested in joining the legal staff of the telephone company, he could not make any commitment to do so until the present case was completed. On July 21, 1977, the jury found the defendant guilty, and

he was sentenced. On July 25, 1977, the prosecutor made a firm commitment to work as an attorney for the telephone company. He commenced that employment on August 5, 1977.

The defendant argues that the offer of employment to the prosecutor by the victim in this case, which was not disclosed during the trial to either the judge or the defendant's attorney, served to raise the possibility that the prosecutor had been influenced in the performance of his duties by feelings of loyalty to his future employer. He claims that the prosecutor may have acted upon these loyalties in derogation of his duties to act in a fair and impartial manner. The defendant argues that the mere probability or appearance that he had been unfairly

treated as a result of this conflict necessitates the granting of a new trial. See Commonwealth v. Howard, 367 Mass. 569, 571-572 (1975). He also argues that, at the very least, the judge's denial of his motion for a new trial was error because the judge declined to hold an evidentiary hearing to determine the extent and effect of this alleged conflict of interest.

It is the prosecutor's obligation to avoid both the reality and appearance of a conflict of interest in the performance of his official duties. See ABA Standard Relating to the Prosecution Function § 1.2 (Approved Draft, 1971). However, the fault for the alleged appearance of a conflict of interest in this matter lies with the victim and not with the prosecutor. We can hardly fault the prosecutor

for being the recipient of an ill-timed offer of employment, which does not appear to have been solicited or negotiated in advance. The prosecutor acted correctly in deferring his decision on the job offer until after the defendant's trial. While it would have been better for him to disclose the receipt of this offer to the judge and the defendant's attorney when it was made, this circumstance, in itself, does not compel the granting of a new trial.

The defendant's motion asserts that he "was deprived of his right to due process because the prosecutor in trying the defendant for this crime, and in recommending the sentence that he did, was serving interests other than impartial and fair prosecution in derogation of his

duties." In other words he contends that the prosecutor may have been motivated by such interests to make the recommendation, which was accepted by the judge, that the defendant be sentenced to a six month term of imprisonment. See Ganger v. Peyton, 379 F.2d 709, 713 (4th Cir. 1967). The defendant's allegation that this sentence recommendation was improperly motivated simply is not borne out by the record. The defendant was tried in Superior Court upon an appeal for a trial de novo from his earlier conviction and six months' sentence in District Court. The prosecutor attested that the general policy of the district attorney's office was to recommend that the same sentence be imposed upon a guilty verdict after a de novo appeal as

had been meted out in the District Court. He informed defendant's counsel that he intended to make such a recommendation.[1] When the prosecutor was asked by the judge during their discussion on sentencing as to what the telephone company viewed as an appropriate sentence, he stated that he had not spoken with the telephone company on that matter. We see no reason for the judge to have disbelieved that representation.

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[1] The prosecutor's affidavit stated: "11. After the trial and prior to the verdict I informed Mr. Krasnoo that my recommendation was going to be six months in the House of Correction, the same as the District Court sentence. Mr. Krasnoo told me that I was being very fair and that he had expected a much higher recommendation in the event of a guilty verdict." The defendant did not file a counter affidavit.

Upon a survey of the whole case, we conclude that the judge did not abuse his discretion in denying the defendant's motion for a new trial. Commonwealth v. DeChristoforo, 360 Mass. 531, 542 (1971). Moreover, the judge acted within his discretion in deciding the motion for a new trial solely upon the affidavits which were before him. Commonwealth v. Heffernan, 350 Mass. 48, 54, cert. denied, 384 U.S. 960 (1966).

3. The remainder of the defendant's numerous assignments of error are without merit and require either limited or no discussion.

a. The judge did not abuse his discretion in allowing the jury to view an artist's sketch which depicted the scene visible to Collins as he watched the

alleged crime from the restroom roof of the Somerville warehouse. Collins testified that he had assisted the artist in composing the sketch. He also stated that in making the sketch the artist had referred to a photograph which had been taken of the place where the theft occurred two days thereafter. Collins testified that the sketch was a fair and accurate representation both of the scene and of the positions of the three men as he had observed them in the warehouse on September 20. The sketch was first entered as an exhibit and later reduced to the status of a chalk. The judge had considerable discretion in controlling the degree to which a chalk could be used in assisting the jury's understanding of Collins' testimony. See

Goldstein v. Gontarz, 364 Mass. 800, 814-815 (1974). Leach & Liacos, Massachusetts Evidence 289-291 (1967). The judge could reasonably have regarded the sketch as adequately verified by Collins' testimony, and he did not abuse his discretion in allowing the sketch to be shown to the jury. See Commonwealth v. St. John, 261 Mass. 510, 522 (1928); Everson v. Casualty Co. of America, 208 Mass 214, 219 (1911); Snow v. Mass. Turnpike Auth., 339 Mass. 620, 622 (1959).

b. The judge's treatment of testimony by Commonwealth witnesses as to the value of the cable stolen from the Somerville warehouse was proper. One witness, Hobart Saunders, testified that he head measured and inventoried the cable which had been recovered from Dunphy's truck. Saunders

testified that in his position as an equipment installation supervisor for the telephone company he had gained familiarity with the types and prices of cable used by the telephone company. He stated that during the two years prior to the defendant's trial he had regularly received a monthly price list of scrap cable from Western Electric, a supplier of cable, that he had used that list to determine whether the telephone company had received an appropriate credit for the cable that it returned to the smelting company after the completion of a job. He placed the value of the stolen cable, if sold for scrap, at around $310.

The judge may within his discretion admit a non-expert's testimony on the value of an item once he has found that the

witness is qualified so to testify due to his familiarity, knowledge and experience with the item. Leach & Liacos, Massachusetts Evidence 105 (1967). The judge's conclusion that Saunders was so qualified was not clearly erroneous, and he properly admitted Saunders' testimony leaving its weight to be determined by the jury. See Rubin v. Arlington, 327 Mass. 382, 384 (1951); Whilley v. Cafrella, 336 Mass. 623, 624 (1958).

The judge also permitted another witness, Robert West, to testify at trial that the retail value of the stolen cable based upon a price catalogue issued by Western Electric, was about $1,988. After West had testified, the judge decided to strike his testimony, and he instructed the jury to disregard it. We perceive

no basis for concluding that the jurors failed to comply with the judge's instructions to disregard West's testimony, see Berlandi v. Commonwealth, 314 Mass. 424, 452 (1943); Commonwealth v. Gordon, 356 Mass. 598, 604 (1970), especially since the jury found the value of the stolen property to be less than $100.

c. The defendant moved to dismiss the complaint or to strike the testimony given by Robert West on the ground that West had allegedly violated a sequestration order which had been applied to all the witnesses during the trial. As noted above, West's testimony was ultimately withdrawn from the jury's consideration for a different reason. The judge acted within his discretion in declining to dismiss the complaint because of this isola-

ted, alleged violation of the sequestration order. Commonwealth v. Navarro, 2 Mass. App. Ct. 214, 223 (1974).

d. The judge properly excluded from evidence certified copies of the defendant's acquittals at his earlier Suffolk County trial. We concur with the judge's conclusion that the defendant's prior acquittals on the July and August charges were irrelevant to the determination of his guilt or innocence of the September 20 theft. See Commonwealth v. Cresta, Mass. App. Ct. , - (1975).[a/] The judge properly exercised his discretion in excluding the copies of the acquittals as they served no useful purpose and might have caused the jury to be confused or misled. Contrast Commonwealth

[a/] Mass. App. Ct. Adv. Sh. (1975) 1286, 1290-1291.

v. Leno, Mass. , - (1978)[b/] (discussion of absence of discretion regarding the introduction of certified copies of prior convictions described under G. L. c. 233, § 21).

e. There is no merit in the defendant's assignment of error concerning the Commonwealth's demonstration of the workings of a cable cutter. The defendant had testified that the cable cutter used in the demonstration was the same type commonly used in the Somerville warehouse. The determination whether such a demonstration was of any value to the jury rested within the judge's discretion. See Commonwealth v. Flynn, 362 Mass. 455, 473 (1972) We will not interfere with his exercise of that discretion particularly as the defen-

[b/] Mass. Adv. Sh. (1978) 787, 788-789.

dent has failed to establish that he was in any way prejudiced by the demonstration.

f. The judge did not err in admitting a six-page handwritten statement which had been composed by the defendant on September 22, 1975. The judge correctly found that portions of the statement were inconsistent with the testimony given by the defendant at trial, and the statement was admitted solely for impeachment purposes. Such a statement "need not contradict in plain terms the testimony of the witness if the trial judge finds that it fairly tends to control or qualify that testimony . ... . The prior statement need only tend in a different direction from what is sworn." Leach & Liacos, Massachusetts Evidence 114 (1967).

g. The judge correctly denied the defendant's motion to dismiss the complaint "on the grounds that the Commonwealth had improperly used the grand jury (which sat is Suffolk County in July, 1976) for investigatory as opposed to accusatory purposes." The defendant has failed to carry his burden of showing either that the Grand Jury had been improperly used or that prejudice had occurred to him in the present case from any misuse. See Commonwealth v. Flynn, supra at 461.

h. At trial Dunphy was called as a witness by the defendant. Dunphy exercised his Fifth Amendment privilege and refused to testify. The judge then allowed the defendant's attorney to read to the jury certain portions of a transcript of the testimony which Dunphy had

given before the grand jury in Suffolk County in July, 1976. In that testimony Dunphy denied that the defendant had been involved in the theft of the cable on September 20. The judge correctly refused to allow the defendant's attorney to read the entire transcript of Dunphy's grand jury testimony because, apart from the portions which were read to the jury, that testimony was irrelevant to the present proceeding. See Commonwealth v. Greenberg, 339 Mass. 557, 580-581 (1959) and cases cited.

i. The judge properly permitted the Commonwealth to introduce testimony by Collins of statements which Dunphy had made to him at the junkyard after the theft of the cable. The judge properly found that Dunphy's statements to Collins

were inconsistent with his subsequent grand jury testimony, which the judge permitted the defendant to read to the jury and in which Dunphy denied the defendant's involvement in the theft of the cable. Contrary to the defendant's contention, the Commonwealth was neither required to confront Dunphy, who, in effect, was a defense witness, with his prior inconsistent statement nor required to afford him an opportunity to explain the apparent inconsistency before the jury. See Allin v. Whittemore, 171 Mass. 259, 262 (1898); Leach and Liacos, Massachusetts Evidence 131 (1967). Contrast G. L. c. 233, § 23. Neither would Dunphy's "unavailability" bar the impeachment of his grand jury testimony. See McCormack, Evidence § 37, at 74

(2d ed. 1972). Compare Fed.R.Evid. 806 and Notes of Advisory Committee thereto, U.S.C.A., Federal Rules of Evidence, at 709-711 (West 1975).

j. The judge did not err in denying the defendant's demand to be provided with a transcript of the testimony given by Moriarty before the grand jury in Suffolk County in October, 1975. Although such material should be routinely supplied by the Commonwealth when properly requested by the defendant, see Commonwealth v. Stewart, 365 Mass. 99, 105-106 (1974), the defendant's attorney did not demand these particular grand jury minutes until he was in the midst of cross-examining Moriarty during the course of the trial. The prosecutor in Middlesex County did not have these Suffolk County grand jury minutes

in his possession at the time of the demand. Nor had he been ordered to produce the minutes prior to trial. The minutes requested by the defendant do not appear in the record of this appeal. See Commonwealth v. DeChristoforo, 360 Mass. at 536 We will not speculate whether the defendant would have benefitted from those minutes, particularly since the defendant had in his possession, during his cross-examination of Moriarty, both the minutes of Moriarty's 1976 grand jury testimony and the transcript of Moriarty's testimony in the District Court. Compare Commonwealth v. Lewinski, 367 Mass. 889, 901 (1975).

k. The judge properly denied the defendant's motion for a directed verdict. The evidence, when considered in the

light most favorable to the Commonwealth, was sufficient to support an inference by the jury that the defendant had intended permanently to deprive the telephone company of the cable. See Commonwealth v. Mangula, 2 Mass. App. Ct. 785, 786 (1975).

1. The defendant has argued as error numerous comments, made by the prosecutor during the course of the trial and in his closing argument, which the defendant alleges were not corrected by the judge. After reviewing each of the instances cited by the defendant we fail to perceive any statement that was made by the prosecutor in the jury's presence which was so inflammatory or prejudicial as to require reversal of the defendant's conviction. Nor do we believe that in-

dividual comment upon each of the matters listed would add anything not fully covered in the cases beginning with Commonwealth v. Earltop, Mass. , - (1977).[c/]

m. The defendant argues that the judge erroneously allowed the Commonwealth to shift its theory in this case from that of proving the defendant's invidual liability for the theft of the cable to that of proving the defendant's participation in a joint venture along with Dunphy and Conroy. We reject this contention. The defendant has failed to indicate any place in the record where the Commonwealth made any representation that it would exclusively proceed on either theory. The defendant should have been

c/ Mass. Adv. Sh. (1977) 532, 536-537.

made aware at the latest by the prosecutor's opening statement that the Commonwealth intended to introduce evidence indicating the possible existence of a joint venture.

n. The judge was not required to give the instruction requested by the defendant on the effect of evidence of the defendant's general reputation for honesty and integrity with regard to the jury's determination whether he had been involved in the theft. The two character witnesses who had been presented by the defendant has testified solely to the defendant's reputation for truth and veracity. This evidence was relevant solely to the jury's assessment of the defendant's credibility as a witness. See Commonwealth v. Beal, 314 Mass. 210, 230 (1943). The

judge's instructions on the credibility of witnesses were adequate. See Commonwealth v. Cook, 351 Mass. 231, 236-237, cert. denied, 385 U.S. 981 (1966).

o. The defendant's assignment of error relating to the judge's instructions to the jury is wholly without merit. The method and extent of the jury charge are matters within the judge's discretion. Commonwealth v. Kelley, 359 Mass. 77, 92 (1971). The judge's charge, when considered as a whole, was fair and adequate. See Commonwealth v. Benders, 361 Mass. 704, 707 (1972).

p. The judge did not abuse his discretion in refusing to poll the jury after the verdict against the defendant was returned. See Commonwealth v. Bregnard,

Mass. App. Ct. , - (1975).[d/]

q. The sentence imposed by the judge upon the defendant was well within the limits set by G. L. c. 266, § 30. The judge did not abuse his discretion in denying the defendant's motion to revise or revoke that sentence. See Commonwealth v. Crowell, 347 Mass. 771 (1964).

Nor do we accept the defendant's contention that the above matters, even if they are not individually sufficient grounds for reversal, should be considered so in their cumulative effect. To the contrary, we conclude that the judge conducted this eight-day trial wisely and fairly.

Judgment affirmed.

d/ Mass. App. Ct. Adv. Sh. (1975) 1153, 1160-1161.

BROWN, J. (concurring). I fully concur in the majority opinion. I do, however, feel compelled to state that the offer of employment which occurred in this case is incompatible with the prosecutor's obligation to avoid both the reality and appearance of a conflict of interest in the performance of his official duties. Cf. In the Matter of Bonin, Mass. , - (1978).[a/] It cannot be gainsaid that the criminal process must not only be fair but that it must manifestly appear to be fair. As the majority pointed out, the instant record does not support the allegation of improper motivation on the part of the prosecutor. I, however, depart slightly from the view expressed by my

a/ Mass. Adv. Sh. (1978) 1936, 1977-1978.

brothers. I believe there was a compelling need for the prosecutor to place on the record the clearly improper offer of employment by the telephone company (the victim here). In short, that offer offends justice, shocks the conscience, and is obnoxious to the concept of fair play. Whether intended or not, the message could not be clearer--the telephone company wanted "an edge".

COMMONWEALTH OF MASSACHUSETTS

Appeals Court For The Commonwealth

At Boston, September 12, 1978.

In the case of

COMMONWEALTH

vs.

ROBERT SHAGOURY

pending in the Superior Court for the County of Middlesex

Ordered, that the following entry be made in the docket, viz:

Judgment affirmed.

By the Court,

/s/ John E. Powers, Clerk

September 12, 1978.

Appendix C - 44a

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

At Boston, November 6, 1978.

ORDER

It is hereby ORDERED, that the following Applications for Further Appellate Review are denied:

M-1079 Commonwealth v. Robert Shagoury
Middlesex Superior Court No. 76-2486
Appeals Court No. A.C. 78-51

By the Court,

/s/ Frederick J. Quinlan

Clerk